No. 87-1379

In The

Supreme Court of the United States

October Term, 1987

UNITED STATES
DEPARTMENT OF JUSTICE, ET AL.,

vs. *Petitioners,*

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, ET AL.

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICI CURIAE BRIEF OF THE STATES OF NEW YORK AND CALIFORNIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE

The State of California, by its Attorney General, John K. Van De Kamp, and the State of New York, by its Attorney General, Robert Abrams, respectfully submit this brief as amici curiae pursuant to Supreme Court Rule 36.4.

The Court of Appeals in this case has ruled that the Freedom of Information Act requires the Department of Justice to disclose criminal history information provided by the states and local governments to the Federal Bureau of Investigation.

Amici voluntarily provide criminal history information to the Federal Bureau of Investigation with the understanding that this information will remain confidential and be used for law enforcement purposes only.

The Attorney General of California is responsible for the security of criminal offender information and is specifically charged with guarding against unauthorized disclosures of information and insuring that this information is disseminated only on a need-to-know basis. He is additionally responsible for the coordination of the interstate exchange of criminal offender record information. (Cal. Penal Code § 11077.)

Additionally, California case law and Article 1, section 1 of the California Constitution recognize the right to privacy as an inalienable right of the individual. See *White v. Davis*, 13 Cal.3d 757, 773-75 (1975). The California courts have found the official retention and dissemination of criminal history information to be an incursion into the right of privacy but they have tolerated this incursion on the ground that it is justified by

a compelling state interest in law enforcement. *Loder v. Municipal Court*, 17 Cal.3d 859, 864-868 (1976); *Central Valley Chap. 7th Step Foundation v. Younger*, 95 Cal.App.3d 212, 236 (1979).

The Division of Criminal Justice Services of the State of New York is responsible for operating New York's criminal history record repository. As part of this responsibility, the Division of Criminal Justice Services is charged with, among other things, ensuring that only "qualified agencies" have access to information held by New York's criminal history repository. N.Y. Executive Law § 837(6) (McKinney 1982). Subdivision 8 of that law imposes on the Division of Criminal Justice Services a duty to "[a]dopt appropriate measures to assure the security and privacy of identification and information data." The Division of Criminal Justice Services is statutorily empowered to disclose criminal history record information only to those agencies or persons authorized by law. The decision of the Circuit Court of Appeals threatens not only the individual privacy rights of individual Californians and New Yorkers but also threatens to undermine the California and the New York courts' tolerance of this limited incursion into the individual's sphere of privacy.

ARGUMENT

I

THE COURT OF APPEALS CONCEPTION OF PRIVACY IS UNDULY RESTRICTIVE AND REPRESENTS A SIGNIFICANT RETREAT FROM MODERN NOTIONS OF PERSONAL PRIVACY.

In its attempts to articulate a rationale for decision, the Court of Appeals twice grappled, each time unsuccessfully, with the exemptions from disclosure that the Freedom of Information Act grants generally to files whose disclosure would constitute a "clearly unwarranted invasion of privacy" (5 U.S.C. § 552(a)(B)(6)) and specifically to law enforcement records or information disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." (5 U.S.C. § 552(a)(B)(7)(C).)

In its first opinion the court decided "private personal information" was information that was "not yet in the public domain." *U.S. Dept. of Justice et al. v. Reporters Committee for Freedom of the Press et al. v. U.S. Department of Justice*, 816 F.2d 730, 738 (DC Cir. 1987).

In its denial of rehearing, the Court of Appeals did not disavow its earlier definition of privacy but stated that the district court had to determine as a question of fact:

> . . . Has a legitimate privacy interest of the subject in his rap sheets faded because they appear on the public record? . . . as a matter of fact, not law . . . by reason of actual practices of the jurisdiction that is

> the original source [has] the subjects privacy interest faded. *Reporters Comm. etc. v. U.S. Dept. of Justice*, 831 F.2d 1124, 1127 (1987).

In California and New York the courts have long recognized that personal privacy interests include protecting individuals from the encroachment of computer technology and government data collection activities which make "cradle-to-grave profiles" of citizens possible. *White v. Davis*, 13 Cal.3d 757, 775 (1975); *Mtr. of Legal Aid Soc. v. Mallon*, 76 Misc. 2d 455 (Sup. Ct. 1973), *modified on other grounds*, 47 A.D.2d 646 (2d Dept. 1975). Concern with the protection of the privacy rights of individuals includes placing appropriate restraints on the information gathering and disseminating activities of government to prevent information legitimately gathered for one purpose from being misused for other purposes or wrongfully disseminated. 13 Cal.3d at 775.

While criminal history information is theoretically in the public domain because somehow, somewhere it could be located, California recognizes a privacy interest in the "compiled criminal history information." It is the act of creating files on citizens and compiling information about them that impinges on the right of privacy.

Controlling the collection and circulation of "personal information" is a fundamental aspect of the right of privacy. *Ibid.* p. 775. In California, the State Supreme Court and the Court of Appeal have actually held that the compilation of criminal history information about arrests that do not lead to convictions is an incursion into the right of privacy justified only by the

compelling state interests in law enforcement. *Loder v. Municipal Court*, *supra*, 17 Cal.3d 859, 865-868 (1976); *Central Valley Chap. 7th Step Foundation v. Younger*, *supra*, 95 Cal.App.3d 212, 236 (1979).

Similarly, New York regards criminal history information in the state's central repository as exempt from disclosure except for criminal justice and other limited purposes specified by statute. New York views computer compilations as exempt even though the underlying records may be public. The Circuit Court's refusal to consider the distinction between information in public records and compilations of those records threatens the privacy interests of the citizens of both New York and California.

As is the case in the majority of States, court dockets and police arrest records are publicly available in New York. By law, in New York "[a] docket-book, kept by a clerk of a court . . . must be kept open . . . for search and examination by any person." N.Y. Judiciary Law § 255-b (McKinney 1983). Likewise, in New York, the information found in police blotters is a matter of public record. Although there is currently no specific reference to "police blotters" as public records, earlier case law and the predecessor to the present Freedom of Information Law have considered "police blotters" public records. *See* 1974 N.Y. Laws, c. 578 § 2; *Sheehan v. City of Binghamton*, 59 A.D.2d 808 (3rd Dept. 1977). Despite the fact that these records are publicly available at the local level, New York has distinguished, by law, between the arrest and conviction records garnered from police blotters and court dockets and the criminal history record information found in the State's central repository.

In its examination of the privacy interests involved in this FOIA request, the Circuit Court of Appeals overlooked the distinction between the original records available at their "primary source" and the criminal record information kept in the repositories in the form of indexed, cumulative records of arrests and convictions. The purposes of these original records of entry and the indexed criminal history records are different. The information found in "police blotters" and court dockets is compiled to record arrests, the filing of criminal charges and court dispositions for the purposes of the agency keeping those records. Criminal history records information, on the other hand, is compiled to give criminal justice agencies and courts as complete as possible a history of an individual's criminal career.

Because the records at issue in this case are those in the indexed form, known customarily as criminal history record information or "rap sheets," the states' treatment of these criminal history records is the more appropriate focus of a court's inquiry when examining privacy interests. Pursuant to state law, New York treats the criminal history record information consolidated in the State's central repository as available only for criminal justice purposes unless otherwise authorized by statute or court order.

Federal decisions are consistent with the notion of individual privacy as "protection from unjustifiable government interference with their private lives." *Tarlton v. Saxbe*, 507 F.2d 1116, 1124 (D.C. Cir. 1971); See also, *Utz. v. Cullinane*, 520 F.2d 467 (D.C. Cir. 1975).

One court has aptly noted that:

> A heavy burden is placed on all branches of Government to maintain a proper equilibrium between the acquisition of information and the necessity to safeguard privacy. Systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work, and to move about in this land. If information available to Government is misused to publicize past incidents in the lives of its citizens the pressures for conformity will be irresistible. Initiative and individuality can be suffocated and a resulting dullness of mind and conduct will become the norm. *Menard v. Mitchell*, 328 F.Supp. 718, 726 (D.C. Dist. 1971) *rev'd sub nom. Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

The Court of Appeals' decision in this case threatens to upset the delicate equilibrium state and federal laws seek to achieve between the acquisition of personal information for law enforcement purposes and the need to protect individual privacy by regulating the distribution of this information.

The Court of Appeals' notion that there ceases to be a privacy interest in arrest records because at one time the information may have been public is unfounded.

> But merely because a fact is one that occurred at a public place and in the view of the general public, which may have been only a few persons or merely because it can be found in a public record, does not mean that it should receive widespread publicity if it does not involve a matter of public concern. There can be such a thing as highly offensive publicity to something that happened long ago even though it occurred in a public place. Wm. Prosser

and R. Keeton, *The Law of Torts* (5 Ed. 1984), p. 859, fn. omitted.

There is an undoubted "social stigma" involved in an arrest record. *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974); (fn. omitted). And this Court has long realized that an individual has an interest in his own reputation.[1] Cf. *Wisconson v. Constantineau*, 400 U.S. 433, 437 (1971).

The release of criminal history information about individuals in response to a freedom of information act request is clearly an "unwarranted incursion of the modern understanding of the notion of" personal privacy.

The decision of the Court of Appeals is a retreat from the modern understanding that personal privacy includes freedom from the dissemination of personal information collected by the government for law enforcement purposes. Additionally, the decision is unconvincing in its attempts to disavow Congress' clear intent that the Freedom of Information Act not be a vehicle for "the unwarranted invasion of privacy."

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1. Not only does an individual have a privacy interest in the release of truthful information about himself, he also has an interest that only accurate information be released. The Federal Bureau of Investigation is simply not in a position to guarantee the accuracy of its records or to resolve disputes over the accuracy of records. *Alexander v. U.S.*, 787 F.2d 1349, 1350 (9th Cir. 1986). The possibility that inaccurate information may be released about individuals is further reason not to allow this information to be released.

Amici respectfully submit that certiorari should be granted to protect the state and federal rights of individuals to privacy.

II

THE DECISION OF THE COURT OF APPEALS THREATENS MANY STATES' VOLUNTARY SHARING OF INFORMATION WITH THE FBI

The Court of Appeals has ruled in essence that any member of the public can obtain criminal history information from the FBI upon a finding that an individual's legitimate privacy interest in maintaining the confidentiality of his criminal history information has faded because the information appears somewhere in the public record (*Reports Comm. etc. v. U.S. Dept., of Justice, supra*, 831 F.2d at 1127). This erroneous holding threatens the continued participation of many states in the NCIC.

States share criminal history information with the FBI on a voluntary mutually beneficial basis. *Menard v. Saxbe, supra*, 498 F.2d at 1021; 28 C.F.R. § 0.85(b). The laws of many states allow the submission of criminal history information to the FBI on a confidential basis with the understanding the information will remain confidential and will be released for law enforcement purposes only.

In California, for example, criminal offender record information is to be disseminated only to agencies who are authorized by statute or law to have access to such

records. (Cal. Pen. Code, §§ 11076; 11081.)[2] The Attorney General of California is responsible for the security of criminal offender record information and is specifically charged with guarding against unauthorized disclosures of information, insuring the information is disseminated only on a need-to-know basis and with coordinating the interstate exchange of criminal offender record information. (Cal. Pen. Code, § 11077.)[3]

Agencies holding or keeping criminal offender information are required to maintain records of

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2. California Penal Code, section 11076 provides:

"Criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute."

California Penal Code, section 11081 provides:

"Nothing in this article shall be construed to authorize access of any person or public agency to individual criminal offender record information unless such access is otherwise authorized by law."

3. California Penal Code, section 11077 provides:

"The Attorney General is responsible for the security of criminal offender record information. To this end, he shall:

"(a) Establish regulations to assure the security of criminal offender record information from unauthorized disclosures at all levels of operation in this state.

"(b) Establish regulations to assure that such information shall be disseminated only in situations in which

(Continued on following page)

agencies to which they have released or communicated information. (Cal. Pen. Code, §11078.)[4]

California Penal Code section 11105 sets forth two categories of agencies and persons authorized by law to receive criminal record information compiled at the state level by the Attorney General. The first category is comprised of agencies and persons to whom the Attorney General is required to furnish this information "*when needed in the course of their duties.*" (Cal. Pen. Code, §11105, subd.(b).) It includes the courts, certain classes of peace officers performing traditional

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(Continued from previous page)

it is demonstrably required for the performance of an agency's or official's functions.

"(c) Coordinate such activities with those of any interstate systems for the exchange of criminal offender record information.

"(d) Cause to be initiated for employees of all agencies that maintain, receive, or are eligible to maintain or receive, criminal offender record information a continuing educational program in the proper use and control of criminal offender record information.

"(e) Establish such regulations as he finds appropriate to carry out his functions under this article."

4. California Penal Code, section 11078 provides:

"Each agency holding or receiving criminal offender record information in a computerized system shall maintain, for such period as is found by the Attorney General to be appropriate, a listing of the agencies to which it has released or communicated such information."

law enforcement functions, district attorneys, probation and parole officers, defense attorneys when so authorized, and state or local agencies or officers in strictly limited circumstances.

Release to the second category is permissive. This category is composed of other agencies or officers to whom the Attorney General "*may*" furnish this information, but he is permitted to do so only "*upon a showing of a compelling need.*" (Cal. Pen. Code §11105, subd.(c).) (See *Loder v. Municipal Court, supra*, 17 Cal.3d at 873.)

Included in the second permissive category, are public officers of the United States authorized by federal statute to receive similar records (Cal. Pen. Code, § 11105(c)(4)) and peace officers of the United States (Cal. Pen. Code, § 11105(c)(7)).

It is a crime to disseminate a criminal history record or information from a criminal history record to an unauthorized person. (Cal. Pen. Code, §§ 11141 and 11142.)[5] It is also a crime for an unauthorized person to

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5. California Penal Code, section 11141 provides:

"Any employee of the Department of Justice who knowingly furnishes a record of information obtained from a record to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor."

California Penal Code, section 11142 provides:

"Any person authorized by law to receive a record or information obtained from a record who knowingly furnishes the record or information to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor."

buy, receive or possess a criminal history record or information from a criminal history record. (Cal. Pen. Code, § 11143.)[6]

Finally, a statutory civil penalty is provided in all cases where criminal record information is unlawfully disseminated. (Cal. Lab. Code, § 432.7(b).) (*Loder v. Municipal Court, supra*, 17 Cal.3d at 873.) Identical statutory provisions govern the dissemination of criminal record information compiled by local law enforcement agencies. (See Cal. Pen. Code, § 13300 et. seq.)

Similarly, New York restricts access to criminal history information. The New York State Division of Criminal Justice Services is charged with the establishment of a central data facility so that only appropriate officials of "qualified agencies" shall "have access to information . . . , which shall include but not be limited to such information as criminal record, personal appearance data, fingerprints, photographs, and handwriting samples". N.Y. Executive Law § 837(6) (McKinney 1982). Access by non-qualified agencies to the criminal history records for employment or licensing purposes is permitted only if the requesting agency has statutory authority for such access. N.Y. Executive Law § 837 (8-a) (McKinney 1982).

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6. California Penal code, section 11143 provides:

"Any person, except those specifically referred to in § 1070 of the Evidence Code, who, knowing he is not authorized by law to receive a record or information obtained from a record, knowingly buys, receives, or possesses the record or information is guilty of a misdemeanor."

California and New York criminal history information is submitted to the FBI with the understanding[7] that it is, as a matter of law, private, confidential information. Disclosure of this information to the general public through the Freedom of Information Act would surely violate the terms of California's and New York's participation with the Federal Bureau of Investigation. Congress did not contemplate this result when it passed the Freedom of Information Act and California's and New York's participation with the FBI is premised on the understanding that this information will remain confidential. This sharing of information is a voluntary federal/state effort organized for law enforcement purposes. If allowed to stand, the

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7. This understanding is based on the federal law which codifies the information gathering practices of the Federal Bureau of Investigation. 28 United States Code section 534 provides in part:

> "§534. Acquisition, preservation, and exchange of identification records; appointment of officials
>
> "(a) The Attorney General shall--
>
> "(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and
>
> "(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.
>
> "(b) The exchange of records authorized by subsection (a)(2) of this section *is subject to cancellation if dissemination is made outside the receiving departments or related agencies. . . .*" (Emphasis added.)

Court of Appeals' decision will disrupt the spirit of cooperation that is essential to the operation of the FBI/State coalition.

Since criminal history information is by law "private" and "confidential" in California, New York and other states, there is no need for the Court of Appeals' "factual" test for privacy. The determination can be made as a matter of law.

Paradoxically, the Court of Appeals, while openly acknowledging that many of the states which provide criminal history information to the FBI "have policies or laws that forbid the release of their own compiled law enforcement information" *Reporters Comm. etc. v. U.S. Department of Justice, supra*, 831 F.2d at 1125, persists in its flawed analysis of Congress' intent in exempting from the Freedom of Information Act information whose release would constitute an "invasion of privacy." Given that as a matter of law, the release of "compiled criminal history information" is forbidden in many states, the Court of Appeals was wrong in promulgating a procedure to be applied on a nationwide basis, for determining, as a factual matter, a subject's privacy interest in the information to be released. The appropriate procedure should be for the Federal Courts, or the Federal Bureau of Investigation on an administrative basis, to determine, as a matter of law, on a state by state basis, if the information was provided to the FBI as private personal information to be disseminated only for law enforcement purposes or if the compiled information is openly disseminated in the state of origin.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully urge this Court to grant the petition for certiorari to resolve the important issue of the realm of personal privacy Congress intended to exempt from the disclosure provisions of the Freedom of Information Act and to avert the implementation of a judicial procedure that has a grave potential for disrupting federal/state cooperative efforts for exchanging criminal history information.

Respectfully submitted,

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